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CASENOTE

**BUYING THE FARM: THE EIGHTH CIRCUIT DECLARES
SOUTH DAKOTA'S ANTI-CORPORATE FARMING AMENDMENT
VIOLATES THE DORMANT COMMERCE CLAUSE**

*South Dakota Farm Bureau v. Hazeltine*¹

I. INTRODUCTION

The family farm has been referred to as “the most socially desirable mode of agricultural production.”² States have tried to insulate the family farm from competition from corporate farms since the dust bowl of the 1930’s.³ To date these statutes had only been challenged on equal protection grounds, and had systematically been upheld. *South Dakota Farm Bureau v. Hazeltine* marks the first case to challenge these laws under the Dormant Commerce Clause of the United States Constitution.

In this ground breaking case, the Eighth Circuit held that South Dakota’s anti-corporate farming amendment had a discriminatory purpose and was “per se” unconstitutional. This case note examines the fallout of that decision given that all nine states with such laws share the common purpose of protecting the family farm way of life. It then moves on to discuss other possibilities given by the Eight Circuit to protect this legitimate state interest.

II. FACTS AND HOLDING

South Dakota Farm Bureau, Inc. and twelve other parties (“plaintiffs”)⁴ brought suit against Joyce Hazeltine in her official capacity as Secretary of State of South Dakota and four other parties (“Defendants”)⁵ claiming Article XVII §§ 21-24 of the South Dakota Constitution (“Amendment E”) violates the Dormant

¹ 340 F.3d 583 (8th Cir. 2003) [hereinafter *South Dakota Farm Bureau*].

² Minn. Stat. § 500.24 (2003).

³ *Agricultural Law*, 6-1 *Agricultural Law* § 51.04 (Matthew Bender & Co., 2003).

⁴ Plaintiffs are Haverhals Feedlot, Inc. and Sjovald Feedyard, Inc. who claim that Amendment E will put them out of business because they raise cattle for non-exempt entities. *South Dakota Farm Bureau*, 340 F.3d at 588. Donald Tesch and William Aeschlimann, who claim that Amendment E prevents them from contracting with non-exempt entities, thereby drastically reducing their income. *Id.* Spear H Ranch, an Arizona corporation whose sole shareholder is the Holben Family Trust (another named plaintiff as is and Marston Holben), claims that Amendment E bars the ranch from raising cattle in South Dakota because the Holbens do not reside or work on the ranch. *Id.* at 589. Frank Brost is the majority shareholder in three entities that own ranch land in South Dakota, and claims that Amendment E prevents his corporations from acquiring more land and diminishes the value of his land because the most likely buyers are non-exempt corporations. *Id.* The South Dakota Farm Bureau and the South Dakota Sheep Growers Association have joined as plaintiffs on behalf of their members. Finally, Montana-Dakota Utilities Company, Northwestern Public Service Company and Otter Tail Power Company claim Amendment E applies to, and raises the cost of, easements owned by the company. *Id.*

⁵ Defendants are Joyce Hazeltine in her official capacity as Secretary of State of South Dakota and Mark W. Barnett in his official capacity as Attorney General of South Dakota; Dakota Rural Action (a family farm interest group) and South Dakota Resources Coalition (an environmental interest group) intervened permissively. *Id.*

Commerce Clause of the United States Constitution.⁶ The Plaintiffs sought a declaratory judgment finding Amendment E unconstitutional and an injunction prohibiting the state from enforcing the amendment.⁷

The Plaintiffs filed suit on June 28, 1999, claiming that Sections 22(1) through 22(15) of Amendment E “have the consequence of securing to South Dakota farmers many of the benefits of a limited liability format while denying farmers or farm investors in neighboring States such benefits.”⁸ In a bench trial the district court held that Amendment E violated the Dormant Commerce Clause, and enjoined the defendants from enforcing the amendment.⁹ In coming to this decision, the district court relied on the *Pike* balancing test to find that the burdens imposed by Amendment E on interstate commerce, specifically those placed on utilities, were excessive compared to the local benefits, in this case protecting family farms and the environment.¹⁰ The Plaintiffs’ request for an injunction was denied upon the granting of declaratory judgment.¹¹

The Defendants appealed to the Appellate Court for the Eighth Circuit. The appellate court relied on first tier analysis of the Dormant Commerce Clause and held that Amendment E has the purpose of discriminating against interstate commerce, and as such was unconstitutional.¹² The appellate court further found that the Defendants did not carry their burden in showing Amendment E was the only means to further their legitimate local interest.¹³ In finding that Amendment E violated the Dormant Commerce clause the appellate court affirmed the District Court’s order enjoining its enforcement.¹⁴

III. LEGAL BACKGROUND

A. Anti-Corporate Farming Statutes

Currently nine states have passed some form of anti-corporate farming statute.¹⁵ Three of these states have such a ban written into their constitutions.¹⁶ The general purpose behind these statutes is to protect family farms from “the superior financial and other business resources of . . . corporations . . . because the cyclical nature of the farming industry periodically causes depressed markets and losses which large, diversified corporations are better able to sustain.”¹⁷ To achieve this equality, states tend to ban corporations from owning

⁶ *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F. Supp. 2d 1020, 1023 (D.S.D. 2002), *aff’d in part*, 340 F.3d 583 (8th Cir. 2003) [hereinafter *Hazeltine*]. “Amendment E” is the popular name for Article XVII §§ 21-24, and refers to its placement on the election ballot. *Id.*

⁷ *Id.*

⁸ *Hazeltine*, 202 F. Supp. 2d at 1046.

⁹ *South Dakota Farm Bureau*, 340 F.3d at 583.

¹⁰ *Hazeltine*, 202 F. Supp. 2d at 1050. The *Pike* balancing test balances the indirect burdens placed on interstate commerce against the local benefits of the law. The district court concluded that the burden was excessive both *in toto* and for lack of an exemption for utilities. *Id.*

¹¹ *Id.* at 1051.

¹² *South Dakota Farm Bureau*, 340 F.3d at 583.

¹³ *Id.* at 596.

¹⁴ *Id.* at 598.

¹⁵ Matthew M. Harbur, *Anti-Corporate, Agricultural Cooperative Laws and the Family Farm*, 4 Drake J. Agric. L. 385, 387 (1999). The nine states are Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, and Wisconsin. Oklahoma, Nebraska and South Dakota have written these bans into their constitutions. Together these nine states account for approximately 30 percent of the nation’s agricultural output. *Id.*

¹⁶ *Id.*

¹⁷ *State ex rel. Webster v. Lehndorf Geneva, Inc.*, 744 S.W.2d 801, 805 (Mo. 1988).

farm land or engaging in farming, with a few notable exceptions for groups such as family farm corporations, non-profit corporations, grandfather exceptions, and exceptions for research farming.¹⁸

Prior to *South Dakota Farm Bureau v. Hazeltine*, these statutes were challenged under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.¹⁹ In *MSM Farms, Inc. v. Spire*, the Eighth Circuit held that protection of the family farm was a legitimate state interest under the Equal Protection Clause.²⁰ The court further went on to say, "It is up to the people of the State of Nebraska, not the courts, to weigh the evidence and decide on the wisdom and utility of measures adopted through the initiative and referendum process."²¹ The Equal Protection Clause is satisfied if the law could rationally protect the interest in question, not whether it will actually meet its objectives.²² The court then dismissed MSM's due process complaints on the same grounds, and noted that MSM had "been 'afforded a fair opportunity to realize the value of the land' if divestiture is subsequently ordered."²³

South Dakota's first attempt at preventing corporate farming came with the Family Farm Act of 1974.²⁴ The Act placed an outright ban on corporate farming and left an exemption for "family farm corporations" and "authorized small farm corporations."²⁵ In 1988 the Family Farm Act was amended to expressly forbid corporate hog farming, prohibiting the owning of a facility for "breeding, farrowing [or] raising of swine."²⁶ In 1995, South Dakota's Attorney General interpreted the new statute as a ban on facilities that conducted all three acts in conjunction, but allowed for the raising of swine alone.²⁷ Under this interpretation, corporations could sidestep the Family Farm Act by financing local facilities in exchange for output contracts.²⁸ In response to this interpretation, activists initiated a proposed amendment to the South Dakota Constitution that would close the loophole to the Family Farming Act.²⁹ In November of 1998, sixty percent of South Dakota's residents approved an amendment modeled after Nebraska's ban on corporate farming.³⁰

South Dakota's anti-corporate farming laws are located in Article 17, Sections 21-24 of the South Dakota Constitution.³¹ Collectively, these amendments to the South Dakota Constitution are often referred to as Amendment E because of their location on the 1998 ballot.³² Section 21 provides that "[n]o corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state, or engage in farming."³³ A corporation is defined as "any corporation organized

¹⁸ Even among these exceptions, limitations are often in place dictating, among other things, that major shareholders live and work on the farm, the amount of money a limited liability company may make from non-farming enterprises, and who constitutes a family.

¹⁹ See *MSM Farms, Inc. v. Spire*, 927 F.2d 330 (8th Cir. 1991).

²⁰ *Id.* at 333.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 335 (quoting *Asbury Hospital v. Cass County*, 326 U.S. 207, 212 (1945)).

²⁴ John C. Pietila, "We're Doing This to Ourselves": *South Dakota's Anticorporate Farming Amendment*, 27 J. Corp. L. 149, 153 (2001).

²⁵ S.D. Codified Laws §§ 47-9A-3, 47-9A-13 (2003).

²⁶ S.D. Codified Laws § 47-9A-13.1

²⁷ Pietila, *supra* n. 24, at 155-56.

²⁸ *Id.* at 156. An output contract in this case allows a "family farmer" to raise live stock for a corporation. These contracts usually involve corporate financing to upgrade the farmer's facilities in exchange for all the animals that the farm will produce.

²⁹ *Id.*

³⁰ *Hazeltine*, 202 F. Supp. 2d at 1027.

³¹ S.D. Const. art. XVII, §§ 21-24 (2003).

³² *Hazeltine*, 202 F. Supp. 2d at 1023.

³³ S.D. Const. art. XVII, § 21.

under the laws of any state of the United States or any country.”³⁴ A syndicate includes “any limited partnership, limited liability partnership, business trust, or limited liability company organized under the laws of any state of the United States or any country,” but does not include general partnerships unless they involve non-family farm corporations or non-family farm syndicates as partners.³⁵

Amendment E has fifteen exemptions, the most significant exempting “family farm corporation[s] or syndicate[s].”³⁶ Section 22 defines “family farm corporation[s] or syndicate[s]” as “a corporation or syndicate engaged in farming or the ownership of agricultural land, in which a majority of the partnership interests, shares, stock, or other ownership interests are held by members of a family or a trust created for the benefit of a member of that family.”³⁷ The exemption is limited to family related within “the fourth degree of kinship according to civil law, or their spouses” and dictates that no one with an interest in the family farm corporation be “nonresident aliens, or other corporations or syndicates,” unless they are related within the fourth degree of kinship to the majority holders of the corporation.³⁸

Section 22 also exempts farming cooperatives which acquire or lease agricultural land and own or feed live stock.³⁹ The cooperative is exempted if “a majority of the shares or other interests of ownership in the cooperative are held by members in the cooperative who are natural persons [or family farm corporations or syndicates] actively engaged in the day-to-day labor and management of a farm.”⁴⁰ In *South Dakota Farm Bureau*, the Eighth Circuit notes that this is an odd exception because Section 21 does not mention farm cooperatives.⁴¹

The third major classification of exemptions creates a grandfather clause for corporations doing business prior to the approval date of the amendment.⁴² Section 22, Subsection 4 is a grandfather clause that allows for corporations and syndicates that gained a legal or beneficial interest prior to approval to hold land in continuous ownership or lease by the same corporation.⁴³ Subsection 5 exempts livestock owned by a corporation or a syndicate prior to the approval date.⁴⁴ Subsection 5 also covers all contracts to produce live stock signed prior to the approval of the amendment, until the contract expires or is terminated by either party.⁴⁵

The final group of exemptions to Section 21 covers a hodgepodge of interests. Section 22, Subsection 3 exempts non-profit corporations organized under state non-profit corporation law.⁴⁶ Subsection 6 covers farmland operated for research or experimental purposes, so long as profits from the farm land are only incidental to the research itself.⁴⁷ Subsection 7 and Subsection 8 cover farmland for the production of alfalfa, growing seed, nursery plants or sod.⁴⁸

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at § 22(1).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at § 22(2).

⁴⁰ *Id.*

⁴¹ *South Dakota Farm Bureau*, 340 F.3d at 588.

⁴² S.D. Const. art. XVII, § 22 at ¶ (4)-(5).

⁴³ *Id.* at ¶ (4).

⁴⁴ *Id.* at ¶ (5).

⁴⁵ *Id.*

⁴⁶ *Id.* at ¶ (3).

⁴⁷ *Id.* at ¶ (6).

⁴⁸ *Id.* at ¶ (7)-(8).

B. The Dormant Commerce Clause

The Commerce Clause of the United States Constitution grants Congress the authority to “regulate commerce with foreign nations, and among the several States . . .”⁴⁹ The negative or “dormant” implication of the Commerce Clause is used by courts to limit the ability of states to pass legislation that discriminates against interstate commerce.⁵⁰ The Court employs the Dormant Commerce Clause to “prevent a state from retreating into economic isolation, or jeopardizing the welfare of the nation as a whole.”⁵¹ The scope of the Commerce Clause is extremely broad and has been defined by the Supreme Court to cover anything that “substantially affects interstate commerce.”⁵² The Dormant Commerce Clause itself is designed to reach state statutes that either directly or indirectly affect interstate commerce.⁵³

It is common for courts use two threshold questions when dealing with the Dormant Commerce Clause.⁵⁴ The first inquiry looks into whether or not the state is “regulating.”⁵⁵ According to the court in *Brown & Williamson Tobacco Corp. v. Pataki*, a state is regulating when it exercises powers unavailable to private parties.⁵⁶ If the court finds that the state is regulating, it goes on to see if the regulation “affects interstate commerce.”⁵⁷ These two questions are all but a formality. The Dormant Commerce Clause has been interpreted so broadly as to include statutes that prohibited the sale of meat not inspected in-state twenty-four hours before slaughter, banned the sale of milk not pasteurized within five miles from the center of town, or required all solid waste be processed by the town recycling center.⁵⁸

At the heart of Dormant Commerce Clause analysis is whether the statute discriminates between in-state and out-of-state persons.⁵⁹ Statutes that directly regulate or discriminate against interstate commerce are generally struck down without further inquiry.⁶⁰ However, statutes that indirectly influence interstate commerce are balanced against a state’s legitimate interest and the burden placed on interstate commerce to achieve that benefit.⁶¹ This balancing of interests for statutes that indirectly affect interstate commerce is referred to as the *Pike* balancing test.⁶²

⁴⁹ U.S. Const. art. I, § 8.

⁵⁰ See e.g. *West Lynn Creamery v. Healy*, 512 U.S. 186, 192 (1994) (“The Commerce Clause also limits the power of the Commonwealth of Massachusetts to adopt regulations that discriminate against interstate commerce.”); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-274 (1988) (“This ‘negative’ aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors . . . Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism . . .”)

⁵¹ *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330-31 (1996).

⁵² *U.S. v. Lopez*, 514 U.S. 549, 559 (1995).

⁵³ *Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority*, 476 U.S. 573, 578-79 (1986).

⁵⁴ *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 208 (2d Cir. 2003).

⁵⁵ *Id.*
⁵⁶ *Id.* (quoting *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 254 (2d Cir. 2001)).

⁵⁷ *Id.*
⁵⁸ See generally *Minn. v. Barber*, 136 U.S. 313 (1890); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951); *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994).

⁵⁹ *Oregon Waste Sys. v. Dept. of Envtl. Quality*, 511 U.S. 93, 99 (1994).

⁶⁰ *Brown-Forman Distillers Corp.*, 476 U.S. at 578-79.

⁶¹ *Id.*
⁶² *Id.* The test is named after *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). In *Pike*, an Arizona statute that required cantaloupes grown in Arizona to be packaged in-state and marked as such before shipment was declared unconstitutional

The Supreme Court has recognized three indicators to determine if a statute directly discriminates against interstate commerce.⁶³ Discrimination refers to “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”⁶⁴ First, discrimination can be established by evidence in the record that shows the statute had a discriminatory purpose.⁶⁵ Second, and less common, are laws that discriminate against interstate commerce on their face.⁶⁶ Third, a statute may have no discriminatory purpose and be facially neutral, but still have a discriminatory effect on interstate commerce.⁶⁷ Once a statute has been declared discriminatory it is “per se invalid” unless the state can show that it had “no other means to advance a legitimate local interest.”⁶⁸

The *Pike* balancing test is used to measure burdens placed on interstate commerce from statutes that regulate evenhandedly and only indirectly affect interstate commerce.⁶⁹ The test balances the burden on interstate commerce against the local benefit.⁷⁰ The challenged statute will be upheld unless it is “is clearly excessive in relation to the putative local benefits.”⁷¹ This test is used when the statute regulates even-handedly against both in-state and out-of-state interests.⁷²

IV. INSTANT DECISION

The Eighth Circuit reviewed de novo the district court’s ruling that Amendment E violated the Dormant Commerce Clause.⁷³ In making its decision, the court focused on evidence in the record that showed Amendment E had a discriminatory purpose.⁷⁴

A. Discriminatory Intent in the Record

To find evidence that the intent of Amendment E was to discriminate against out-of-state businesses, the court paid close attention to the “pro” statement compiled as part of a “pro-con” by South Dakota’s Secretary of State Joyce Hazeltine and distributed to voters prior to the election.⁷⁵ The court focused on two assertions of the “pro” statement in particular. According to the “pro” statement, without Amendment E, “desperately needed profits will be skimmed out of local economies and into the pockets of distant corporations.”⁷⁶ The

because the state’s interest, promoting local cantaloupe producers, did not meet the burden of forcing growers to package their product in-state. *Id.* at 143.

⁶³ *South Dakota Farm Bureau*, 340 F.3d at 593.

⁶⁴ *Oregon Waste Sys., Inc.*, 511 U.S. at 99.

⁶⁵ *Bacchus Imports v. Dias*, 468 U.S. 263, 270 (1984). Courts are limited in the evidence they are allowed to use to establish a discriminatory purpose. See e.g. *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 336 (4th Cir. 2001) (historical background of and specific sequence of events leading up to state action); *SDDS, Inc. v. South Dakota* 47 F.3d 263, 268 (8th Cir. 1995) (referendum pamphlet); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 743-46 (1989) (statements by drafters of statute).

⁶⁶ *Chemical Waste Management v. Hunt*, 504 U.S. 334, 342 (1992).

⁶⁷ *Maine v. Taylor*, 477 U.S. 131, 148 (1986).

⁶⁸ *C & A Carbone*, 511 U.S. at 392.

⁶⁹ *Pike*, 397 U.S. at 142 (1970). See also *supra* n. 62.

⁷⁰ *Id.* at 142.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *South Dakota Farm Bureau*, 340 F.3d at 592.

⁷⁴ *Id.* at 593.

⁷⁵ *Id.* at 594.

⁷⁶ *Id.*

second assertion by the “pro” statement claimed that “Amendment E gives South Dakota the opportunity to decide whether control of our state’s agriculture should remain in the hands of family farmers and ranchers or fall into the grasp of a few, large corporations.”⁷⁷ After citing these two examples, the court found the “pro” statement to be “brimming with protectionist rhetoric.”⁷⁸

The appellate court then moved on to look at notes from the Amendment E drafting meetings to show evidence of the drafters’ intent.⁷⁹ The court looked at one drafter’s testimony that Amendment E was meant to “to get a law in place to stop [Murphy Family Farms and Tyson Foods],” and further meetings were held on how to best defend against these companies and others.⁸⁰ The court also looked at memoranda that expressed fears that Tyson, Murphy, Farmland and Minnesota Corn producers would be “walking all over them.”⁸¹

Finally, the court looked with disfavor on the information used to support the goals of Amendment E.⁸² While the court did recognize the state’s argument that an individual farmer accepts greater responsibility for the environment than those farms run by corporations, it nonetheless looked down on the drafters for failing to examine the effects of current environmental legislation.⁸³ The court was also critical of the drafters for failing to use or commission studies on the impact of shutting out corporate farming in the state.⁸⁴ Finally, the court noted that the drafting process was completed quickly to prevent Tyson and Murphy from building facilities in South Dakota.⁸⁵ The court found that all of this lack of information created a “low probability of effectiveness,” which could be used as indirect evidence of a discriminatory purpose.⁸⁶

Based on the above information, the court found that the intent of Amendment E was to restrict in-state farming by out-of-state corporations and syndicates in order to protect local interests.⁸⁷ This, the court said, “bespeaks of ‘the economic protectionism that the commerce clause prohibits.’”⁸⁸

Before the court moved on to address other methods of advancing the state’s interest, it addressed the district court’s argument against attempting to discern the purpose of a constitutional amendment.⁸⁹ According to the appellate court, it is enough to have the intent of the individuals who drafted Amendment E.⁹⁰ In deciding what kinds of evidence to examine, the court relied on precedent from other districts.⁹¹

⁷⁷ *Id.*

⁷⁸ *Id.* (quoting *SDDS, Inc. v. South Dakota*, 47 F.3d at 268).

⁷⁹ *South Dakota Farm Bureau*, 340 F.3d at 594. The court also noted that these meetings were often referred to as “hog meetings.” *Id.*

⁸⁰ *Id.* Murphy Family Farms and Tyson Foods were out-of-state corporations proposing two hog farming facilities in South Dakota. *Id.*

⁸¹ *Id.*

⁸² *Id.* “In this case, the record leaves a strong impression that the drafters and supporters of Amendment E had no evidence that a ban on corporate farming would effectively preserve family farms or protect the environment, and there is scant evidence in the record to suggest that the drafters made an effort to find such information.” *Id.*

⁸³ *Id.* at 595. The court was disconcerted that the witness, a lobbyist for environmental legislation, could not explain the present and future effects of South Dakota’s environmental laws. *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 596.

⁸⁸ *Id.* (quoting *West Lynn Creamery*, 512 U.S. at 205).

⁸⁹ *South Dakota Farm Bureau*, 340 F.3d at 596. “It would be impossible . . . to ascertain the intentions of the thousands of citizens of South Dakota who voted for Amendment E. We do not have here a factual scenario of elected delegates to a constitutional convention where a record is kept of all proceedings.” *Id.* (quoting *Hazeltine*, 202 F. Supp. 2d at 1028).

⁹⁰ *South Dakota Farm Bureau*, 340 F.3d at 596.

⁹¹ *Id.*

B. Other Methods

Upon finding that Amendment E was motivated by a discriminatory purpose, the defendants were left to show that there were no other methods available to protect legitimate local interests.⁹² In examining the evidence, the court applied a test of "strictest scrutiny."⁹³ In the current situation, the defendants defined the legitimate local interests as the promotion of family farms and the protection of the environment, both having been held by the Eighth Circuit to be legitimate state interests.⁹⁴ The defendants in this case had the burden of showing that there is no alternative to Amendment E for protecting these interests.⁹⁵

Once again, the court turned to the record to demonstrate the lack of evidence that "suggests, evaluates, or critiques alternative solutions."⁹⁶ Because of the lack of evidence, the court suggested several possibilities given to the U.S. Department of Agriculture to demonstrate that such alternatives exist.⁹⁷ While the court did not comment on the effectiveness of these suggestions, it held that their existence was enough to show the defendants did not carry their burden.⁹⁸

The court affirmed the district court's order enjoining the enforcement of Amendment E, based on its holdings that Amendment E violated the Dormant Commerce Clause in that: (1) the intention of Amendment E's drafters was to discriminate against out-of-state business and (2) the defendants were unable to carry the burden of showing that Amendment E was the only available means to protect their legitimate state interests.⁹⁹ In reaching their decision on the first tier of Dormant Commerce Clause analysis, the court did not discuss the *Pike* balancing test used by the District Court.¹⁰⁰

V. COMMENT

The Eighth Circuit's holding in the instant decision may mark the end of anti-corporate farming statutes, and will drastically alter how states go about protecting the interests of family farms.

A. Effects of the Instant Decision

The instant decision marks the first constitutional blow to anti-corporate farming statutes, and it appears to be a crippling blow. Prior to *South Dakota Farm Bureau*, courts had only been asked to decide whether such laws violated the Equal Protection Clause of the Fourteenth Amendment.¹⁰¹ These cases were satisfied so long as, "the people . . . could rationally have decided that prohibiting non-family farm corporations might protect an agriculture where families own and work the land."¹⁰² The issue in *South Dakota Farm Bureau* is not whether a legitimate state interest is being protected, but whether the statute discriminates against interstate commerce.¹⁰³ Upon finding Amendment E discriminates against interstate commerce, the Eighth Circuit applied a test of

⁹² *Id.*

⁹³ *Id.* at 597.

⁹⁴ *Id.* See *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 333 (8th Cir. 1991) (Finding Nebraska's constitutional ban on corporate farming was a legitimate interest in an Equal Protection Case).

⁹⁵ *South Dakota Farm Bureau*, 340 F.3d at 597.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See e.g. *MSM Farms, Inc. v. Spire*, 927 F.2d at 333; *Asbury Hospital v. Cass County*, 326 U.S. 207, 214-15 (1945).

¹⁰² *MSM Farms, Inc.*, 927 F.2d at 333.

¹⁰³ *South Dakota Farm Bureau*, 340 F.3d at 593.

“strictest scrutiny.”¹⁰⁴ This test requires the state to show that they have no other method to protect an otherwise legitimate state interest.¹⁰⁵

The court’s holding creates two distinct problems for states trying to maintain their existing statutes. First, the court relies on the record to show that the law has a discriminatory purpose.¹⁰⁶ Based on this standard, all such statutes would appear to be nullified because they all share the same discriminatory purpose, to insulate the family farm from large corporations which are better able to compete in an unstable market.¹⁰⁷ The purpose of Minnesota’s anti-corporate farming statute is to “encourage and protect the family farm as a basic economic unit, to insure it as the most socially desirable mode of agricultural production, and to enhance and promote the stability and well-being of rural society in Minnesota...”¹⁰⁸ This statement has as much “protectionist rhetoric as South Dakota’s purpose.”¹⁰⁹ As one critic has put it, all “Midwestern states’ corporate farming statutes merely imply . . . No newcomers, domestic or foreign, need apply. New capital, new farmers, new ideas—nothing alien to the farming tradition as incumbent landowners know it need apply for entry.”¹¹⁰

By not characterizing the Amendment E as an indirect burden on interstate commerce, the court takes away the opportunity to use the *Pike* balancing test, which would focus attention on the actual constraints of the statute instead of overly broad concerns with discriminatory purpose.¹¹¹ The line between discriminatory purpose and the indirect burden described in *Pike* is murky at best, and in this case is all but invisible.¹¹² The district court in this case found Amendment E to be an indirect burden because it had similar effects on both in-state and out-of-state corporations.¹¹³ Using the *Pike* approach creates two advantages for interpreting statutes similar to Amendment E. First, *Pike* requires rational basis analysis, giving more breathing room to states that find themselves defending their statutes. This is because under the *Pike* test, a statute must have a benefit that is less than a burden. In this case both environmental concerns and the protection of family farms have been found to be compelling state interests¹¹⁴ and would require a great burden on interstate commerce to be struck down. Second, by using *Pike* courts can allow statutes with a similar interest to Amendment E—protecting their rural economies—to be construed more narrowly and both protect the family farm and limit the burdens on interstate commerce. By focusing on the purpose of the statute, the court is basing its decision on a feature common to all statutes. In essence the court’s limited interpretation of Amendment E’s purpose leaves almost no room to find less restrictive statutes constitutional.

The second major burden on states with laws similar to Amendment E is showing that there no other method to protect this interest.¹¹⁵ From a practical standpoint, this burden is almost impossible to meet. At the end of the Eighth Circuits opinion, the court gives a list of possible alternatives to anti-corporate farming statutes and points to a United States Department of Agriculture report as a source of others.¹¹⁶ With these

¹⁰⁴ *Id.* at 596-97.

¹⁰⁵ *Id.* at 596.

¹⁰⁶ *Id.*

¹⁰⁷ See generally e.g. *Nixon v. Premium Standard Farms, Inc.*, 100 S.W.3d 157, 162 (Mo. App. W.D. 2003).

¹⁰⁸ Minn. Stat. § 500.24 (2002).

¹⁰⁹ “Amendment E gives South Dakota the opportunity to decide whether control of our state’s agriculture should remain in the hands of family farmers and ranchers or fall into the grasp of a few, large corporations.” *South Dakota Farm Bureau*, 340 F.3d at 594.

¹¹⁰ Jim Chen, *The American Ideology*, 48 Vand. L. Rev. 809, 827 (1995).

¹¹¹ See generally *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995).

¹¹² *Hazeltine*, 202 F. Supp. 2d at 1045.

¹¹³ *Id.* at 1051.

¹¹⁴ See *Hazeltine*, 202 F. Supp. 2d at 597; *MSN Farms, Inc.*, 927 F.2d at 333.

¹¹⁵ *South Dakota Farm Bureau*, 340 F.3d at 596.

¹¹⁶ *Id.* at 597. The court examined *A Time to Act: A Report of the USDA National Commn. on Small Farms* <<http://www.reeusda.gov/smallfarm/ncosf.htm>> (Jan. 1998).

examples and the amount of scholarly criticism pointed towards the use of anti-corporate farming statutes to protect family farms, it seems unlikely that this burden can be met.¹¹⁷ However, the Court does leave a very faint hope for other states. The Eighth Circuit focuses on the fact that no evidence exists that “suggests, evaluates, or critiques alternative solutions.”¹¹⁸ This suggests that while it would be very difficult to show that Amendment E was the only means of promoting these ends, it could possibly be proven with the right information. While using data to link industrial farming with poverty is not enough, the court suggests that legitimate consideration of alternatives may be enough to meet this “high burden.”¹¹⁹ It is, however, a faint hope, and may more reflect the appellants’ lack of preparation than the possibility of meeting the burden of showing no other legitimate means. It becomes even less promising when the court, even hesitantly, lists a number of possible alternatives that were not considered by the appellants.

B. Options Available to Legislatures

With the constitutionality of statutes banning corporate farming in question, legislatures must find new ways to protect and promote the family farm. The court lists four possibilities that together may pose an alternative to an outright ban on corporate farming.¹²⁰ These possibilities can be grouped into two categories: optimizing the strengths of small farms and increased paternalism in the form of regulating contracts between small farms and corporate farms and enforcing existing environmental laws. According to the court, a state could implement initiatives to optimize the resources of a small farm.¹²¹ This may involve a large range of actions from developing organic and free range farming to encouraging “direct marketing streams” and education on sustainable farming.¹²² The USDA refers to this approach as sustainable agriculture.¹²³ The main goals of sustainable agriculture are to promote environmental health, economic profitability, and social and economic equity.¹²⁴ To do this, it is recommended that resources be focused on higher value products that produce more return per acre.¹²⁵ This would move small farms away from using capital and technology to produce large scale amounts of product, a system that is harder to compete in and wears out the land faster.

There are many ways of promoting sustainable farming. Recommendation 6.3 suggests targeting consumers with ads and material explaining the benefits of organic foods, as well as educating farmers on organic production and standards.¹²⁶ In many ways the market has already begun to do this, and state and federal legislatures would simply have to augment the process. The area where this is most visible is in the market of free range chickens and pork. In 2001, the Mexican grill Chipotle began contracting with 150 family farms in Iowa, Illinois and Minnesota to produce the free-range pork needed for its restaurants.¹²⁷ The company

¹¹⁷ See generally e.g. Jan Stout, *The Missouri Anti-Corporate Farming Act: Reconciling the Interests of the Independent Farmer and the Corporate Farm*, 64 UMKC L. Rev. 835, 856 (1996) (“States prohibiting corporate hog farming suffer the initial loss of production and processing facilities, as well as lower market prices...”); Steven Bahls, *Agri-Business: The Way Ahead: Preservation of Family Farms— The Way Ahead*, 45 Drake L. Rev. 311 (1997) (It is questionable whether society has the resolve to make the necessary investment to protect the family farm.)

¹¹⁸ *South Dakota Farm Bureau*, 340 F.3d at 597.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See *A Time to Act*, *supra* n. 116.

¹²³ *Id.* at Policy Goal 6.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at Recommendation 6.3.

¹²⁷ Rachel Brand, *Chipotle Tries Pork From Pigs Who Lived High on the Hog*, Rocky Mountain News 3B (Aug. 15 2001).

has since increased to doing business with 175 family farms and hopes to reach 300 in the next five years as the company grows. Chipotle is not alone; Niman Ranch Pork of Iowa pays about eight cents more a pound for free range pork than for regular pork.¹²⁸ The market for free range pork is one in which small farmers can thrive and is difficult for corporate farms to invade. This is because pigs are notoriously hard to raise in large numbers where conditions cannot be constantly monitored to prevent disease.¹²⁹ Because sickness spreads so quickly, the risk of raising hundreds of hogs at a time is too high for corporate farmers to invade this niche.¹³⁰ Instead, this opportunity has fallen on small farms that raise about 80 animals at any one time. The rise in demand for free-range pork has mirrored the rise of demand for free-range chicken a decade ago, and it appears that free-range beef is not far behind.¹³¹

Any attempt by state legislatures to encourage this market would show positive results for small family farms. The most productive way, however, may be what USDA calls "direct marketing."¹³² The most common form of direct marketing are farmers' markets.¹³³ These markets are often specialty markets, and allow farmers to vertically integrate and control production from planting to harvest to sale.¹³⁴ In 1992, the revenue from these direct sales totaled over \$400 million dollars, and because of the structure, farmers retain more of every dollar spent by consumers than had they entered the market through a less direct method.¹³⁵ In 1996, there were an estimated 2,400 farmers' markets in the nation and the number is believed to be rising, these are not, however, the only sources for direct marketing.¹³⁶ There still exists the possibility of direct marketing to restaurants such as Chipotle, as well as natural food stores, bakeries, and butchers.¹³⁷ Attempts to encourage family farms to capitalize on these markets must be coupled with educational programs to teach new farming and management techniques that come with organic farming and marketing products directly to consumers.

The other major option for states is to create new environmental laws and to step up enforcement of existing laws. The two major environmental concerns in farming are water and air pollution. Water pollution can be divided into two categories: point source and non-point source.¹³⁸ Large feedlots are the major point source polluters in agriculture, and while many state and federal laws regulate point source pollution, spills can and do occur. In 1996, Premium Standard Farms of Missouri leaked millions of gallons of hog waste, killing fish and affecting the drinking water of local communities, just one year after Continental Grain of Missouri leaked 500,000 gallons of hog waste.¹³⁹ These leaks resulted in a \$250,000 fine for Premium Standard Farms and \$268,500 fine for Continental Grain.¹⁴⁰ Both spills revealed that the operating waste systems did not follow

¹²⁸ Estes Thompson of the Associated Press, *Farmers Say Free-Range Pigs Taste Better* (April 2003).

¹²⁹ Scott Kilman, *Power Pork: Corporations Begin To Turn Hog Business Into an Assembly Line*, Wall St. J., A1 (March 28, 1994).

¹³⁰ Stout, *supra* n. 117, at 840.

¹³¹ See generally Molly Colin, *Elite meat: Shoppers sold on organic produce find its main-course counterpart—certified beef, poultry, and pork—to be elusive*, Christian Science Monitor (July 14, 2003). Colin notes the increased rise in concern over antibiotics used in the beef industry. *Id.*

¹³² *A Time to Act*, *supra* n. 116, at Policy Goal 3.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See *id.*

¹³⁸ *Agricultural Law*, 2-14 Agricultural Law § 14.01 (Matthew Bender and Company, 2003). Point Source pollution occurs at a clearly discernable point of discharge, like a pipe. Non-point source pollution is a diffuse discharge of waste with no discernable point of discharge. *Id.*

¹³⁹ See Stout, *supra* n. 117, at 848.

¹⁴⁰ *Id.* at 849.

approved designs.¹⁴¹ Environmental catastrophes such as this can be prevented by closer monitoring of both corporate and family farming. Other possibilities involve licensing feed lots that meet a certain size or house a certain number of animals.¹⁴² Kansas requires that an owner/operator of a feedlot with a thousand or more animals must obtain a license and meet certain operating standards.¹⁴³ After the court's decision in *South Dakota Farm Bureau*, states must begin to rely on statutes such as this to protect both the environment and family farms.

The problems surrounding air pollution in the farm setting once again centers around large feedlots.¹⁴⁴ The problem arises from the smell of created by the waste of hundreds, and sometimes thousands, of animals being processed in a small space.¹⁴⁵ States have traditionally dealt with this issue via two means. The first, described above, involves the licensing of feedlots.¹⁴⁶ A more indirect way of placing limitations on feedlots has come from private nuisance suits and court ordered injunctions.¹⁴⁷ Courts have begun to allow anticipatory nuisance suits against hog confinements when they simply seek an injunction.¹⁴⁸ The basis of these claims centers on the smells and pests associated with large feedlots, and the depreciation in value they cause to surrounding residences.¹⁴⁹ While these forms of action are becoming increasingly more common, states should not rely on them as a means to further social and environmental policy. This is because feedlots are increasingly located in isolated areas of states to avoid these cases.¹⁵⁰ There are also a number of defenses available to private nuisance cases that make them relatively difficult to bring¹⁵¹—that the operation is state of the art, that the operator has complied with local, state and national guidelines, or that the nuisance is prevented by statutes referred to as “right to farm laws.”¹⁵²

¹⁴¹ *Id.*

¹⁴² *Agricultural Law*, 2-14 *Agricultural Law* § 14.03 (Matthew Bender & Co., 2003).

¹⁴³ Kan. Stat. Ann. §§ 47-1503—47-1505 (2003). Section 1505 requires that, among other things, feedlot owners provide adequate methods for disposing waste and provide adequate drainage to lessen the amount of pollution to streams and lakes.

¹⁴⁴ *Agricultural Law*, 2-13 *Agricultural Law* § 13.01 (Matthew Bender & Co., 2003).

¹⁴⁵ *Id.* In most feedlot circumstances the animals are housed indoors, and waste is removed through confinement floors. The waste is then pumped into large holding tanks, lagoons or pools for evaporation purposes. The waste is then used as fertilizer. It is at the storage and evaporation stages where most environmental problems occur, including the polluting odors. *Id.* For a description of the evaporating and fertilizing process, see *State ex rel. Nixon v. Premium Std. Farms*, 100 S.W.3d 157, 159 (Mo. App. W.D. 2003).

¹⁴⁶ See generally *Agricultural Law*, 2-14 *Agricultural Law* § 14.03 (Matthew Bender & Co., 2003).

¹⁴⁷ See generally Andrea Levinson Ben-Yosef, *Hog Breeding, Confining, or Processing Facility as Constituting Nuisance*, 93 A.L.R.5th 621 (2001).

¹⁴⁸ See generally *Rutter v. Carroll's Foods of the Midwest, Inc.*, 50 F. Supp. 2d 876 (N.D. Iowa 1999) (holding that while no damages could be awarded, theory of anticipatory nuisance was enough to survive a motion to dismiss for failure to state a claim for which relief may be granted); *Superior Farm Mgt., L.L.C. v. Montgomery*, 270 Ga. 615 (1999), 513 S.E.2d 215 (Ga. 1999) (upholding an injunction to cease building a hog confine that would hold 22,800 hogs, because the resulting smells, which would reach two to three miles, constituted reasonably certain to nuisance).

¹⁴⁹ *Agricultural Law*, 2-13 *Agricultural Law* § 13.02 (Matthew Bender & Co., 2003). It is important that the loss in value be claimed because individual harm is needed for a private nuisance suit.

¹⁵⁰ For instance, Premium Standard Farms (a Missouri hog producer) is allowed by Missouri statute to operate in Mercer, Putnam, and Sullivan counties because the county population is between 3,000 and 4,000 individuals. Mo. Rev. Stat. § 350.016 (2003).

¹⁵¹ Ben-Yosef, *supra* n. 147, at 634.

¹⁵² *Id.* Currently 48 states have these so called “right to farm laws.” *Agricultural Law*, 13-124 *Agricultural Law* § 124.01 (Matthew Bender & Co., 2003).

VI. CONCLUSION

The Eighth Circuit struck down Amendment E based on its discriminatory purpose, a purpose shared by all nine states with such statutes. This being said, it would not be a stretch to assume all such statutes will soon be struck down as unconstitutional. In the wake of this decision, state legislatures are left with two choices: let the family farm compete and ultimately be consumed by corporate farms, or find new methods of protecting the rural way of life.

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